Petition

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81 No. 286

IN THE

Supreme Court of the United States

October Term, 1981

DOUGLAS C. COEN and ROBERT PAGE,

Petitioners,

—v.—

THE HARRISON COUNTY SCHOOL BOARD, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether plaintiffs who were twice denied their rights before filing suit, who after filing suit obtained their objective from defendants without a formal court order, who thereby vindicated their rights, and who thereafter were found by the trial court to be the prevailing parties entitled to an award of fees under the Civil Rights Attorney's Fees Awards Act of 1976 [the "Fees Act"], can be ultimately held not to have been the prevailing parties?

LIST OF THE PARTIES

The petitioners, the plaintiffs-appellants below, are DOUGLAS C. COEN and ROBERT PAGE. Petitioners are officers and members of the Ku Klux Klan of Mississippi.

The respondents, the defendants-ap-

pellees below, are THE HARRISON COUNTY SCHOOL BOARD, and its members: CHESTER COLLINS, BOBBY ELEUTERIUS, OREN MILLER, CHARLES LIZANA, and GERALD LOTT.

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OPINIONS BELOW

The unreported decision of the U.S. District Court for the Southern District of Mississippi denying petitioners' request for attorney's fees, filed on October 23, 1978, is attached as Appendix A at 1a-5a. The District Court's unreported judgment denying fees, entered on November 20, 1978, is attached as Appendix B at 6a-7a. The unreported judgment of dismissal, entered on February 7, 1979, is attached as Appendix C at 8a-9a.

On September 17, 1979, the U.S. Court of Appeals for the Fifth Circuit vacated and remanded the District Court's denial of fees. The Fifth Circuit's unreported decision is attached as Appendix D at 10a-16a.

The unreported opinions of the District Court, entered on October 16, 1979 and November 23, 1979, holding that petitioners were prevailing parties and awarding petitioners an attorney's fee in the amount of $100, are attached hereto as Appendices E and F at 17a-20a, 21a-24a, respectively.

The decision by the U.S. Court of Appeals for the Fifth Circuit, holding that petitioners were not prevailing parties within the meaning of the Civil Rights Attorney's Fees Awards Act, was entered on February 23, 1981 and is reported at 638 F.2d 24 (5th Cir. 1981). A copy of the decision is attached as Appendix G at 25a-33a. The Fifth Circuit's denial of the petition for rehearing and for rehearing en banc, entered on April 7, 1981, is noted at 638 F.2d 24 (5th Cir. 1981), and is attached as Appendix H at 34a-36a.

JURISDICTION OF THIS COURT

The decision of the Fifth Circuit was entered on February 23, 1981. The petition for rehearing and rehearing en banc was denied by the Fifth Circuit on April 7, 1981.

On June 27, 1981, Justice Lewis F. Powell, Jr., signed an order extending the time for filing a Petition for a Writ of Certiorari to and including August 6, 1981.

Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

STATUTE INVOLVED

The federal statute involved in this case is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 as amended, which provides in pertinent part:

> "In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42], Title IX of Public Law 92-318 [Title IX of the Education Amendments of 1972, Sections 1961-1686 of U.S.C. Title 20] . . . or Title VI of the Civil Rights Act of 1964 [Sections 2000d, et seq., of U.S.C. Title 42], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

Petitioners are officers and members of the Knights of the Ku Klux Klan of Mississippi. In August of 1977, and again in May of 1978, petitioners requested from respondents permission to use the ballpark facilities of Saucier Elementary School for a public assembly to be held during non-school hours. The ballpark facilities of Saucier Elementary School are a public place. These facilities had previously been used during non-school hours for non-school functions such as political rallies, family reunions and benefits, athletic events, and youth organization meetings. Nonetheless, respondents rejected petitioners' requests for use of the ballpark facilities.

On August 3, 1978, petitioners filed a civil action under 42 U.S.C. §1983 in the United States District Court for the Southern District of Mississippi seeking injunctive and declaratory relief. Petitioners alleged that they had been deprived of rights secured by the First

and Fourteenth Amendments to the United States Constitution. The respondent local officials answered and stated such an assembly would endanger the good race relations that allegedly existed in Harrison County, Mississippi.

The case proceeded to trial before United States District Judge Harold Cox. During the trial respondents' witnesses admitted that previous Klan assemblies and rallies in the area had been non-violent and completely without incident. Thereafter Judge Cox indicated his belief that petitioners' constitutional rights had been violated. Judge Cox suggested that petitioners reapply for use of the property with the assurance that petitioners would avoid the display of weapons, the lighting of crosses and the wearing of masks. Judge Cox also suggested that petitioners post a $500 cash bond to defray any damages that might occur. Following the court's recommendation, petitioners resubmitted their request to respondents for use of the

property. Respondents granted this request, and on September 16, 1978, petitioners held their assembly without incidence of violence or disturbance.

Having vindicated their rights and obtained the objective sought, petitioners filed a properly supported request for reasonable attorney's fees under the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. §1988 as amended [the "Fees Act]. Petitioners sought $7,427.36 for services performed by their chief counsel, Robert J. LaBine. Mr. LaBine, then engaged in the private practice of law in Gulfport, Mississippi, was a cooperating attorney for the American Civil Liberties Union Foundation. Mr. LaBine had volunteered to provide legal services in this case, and had agreed to be compensated only in the event of an award of attorney's fees by the court. Petitioners' other attorneys, staff attorneys for the ACLU Foundation, made no request for compensation for the legal services they contributed in this action.

In lieu of a hearing on the request for attorney's fees, counsel for the parties agreed to submit briefs to the court. In a decision entered on October 23, 1978, Judge Cox denied the request for attorney's fees, see Appendix A at 1a-5a; and a judgment was entered to that effect on November 20, 1978. See Appendix B at 6a-7a.[1]

Petitioners appealed the denial of attorney's fees to the United States Court of Appeals for the Fifth Circuit. The appeal was placed on the summary calendar. On September 17, 1979, the Fifth Circuit in a per curiam opinion vacated and remanded the denial of fees, holding that the trial court was required to determine whether petitioners were the prevailing parties. See Appendix D at 10a-16a. In the Fifth Circuit's view, petitioners probably were the

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1. Judge Cox subsequently held that the case was moot, and accordingly entered a judgment of dismissal without prejudice. See Appendix C at 8a-9a.

prevailing parties since they had accomplished the objective of their lawsuit:

> "While we in no way intend to indicate our final opinion concerning the merits of this action, it appears that counsel for petitioner obtained authorization for the 'Americanism Rally,' thereby accomplishing that which they sought to accomplish." Appendix D at 15a-16a.

On remand, Judge Cox recognized that under the Fees Act "a party plaintiff may be considered the prevailing party even though the judgment was by consent and without formally obtaining relief." Appendix E at 18a-19a. He thus held "that the plaintiffs in this case under these circumstances were the prevailing party and consequently they are entitled to a reasonable attorney's fee." Id. at 19a. The court directed that the parties try to agree to a reasonable attorney's fees, or plaintiffs' counsel file a sworn statement disclosing the requested fee. In response, Mr. LaBine filed a verified amended affidavit seeking $8,192.52 in fees, which

included fees for the 12.75 additional hours expended on appeal.

In a subsequent judgment, see Appendix F at 21a-24a, Judge Cox held that "the sum of $100.00 as attorney's fees should be awarded to the Plaintiffs by the Defendants, and that said sum is a reasonable sum for a reasonable attorneys' fee under the special circumstances existing in this cause," Appendix F at 23a.

Petitioners again appealed. This time the Fifth Circuit affirmed, holding that petitioners actually had never been the prevailing parties. See Appendix G at 25a-33a. In its decision the Fifth Circuit initially conceded that petitioners had twice been denied the right to hold their rally before filing this case, id. at 26a, and also recognized that a plaintiff is entitled to a full award of fees when "his suit has served to vindicate his rights, whether by court decision, consent judgment, or voluntary compliance by the defendants after the filing of the suit," id. at 29a. Nonetheless, the

Fifth Circuit held that petitioners "did not prevail" within the meaning of the Fees Act because they had "not gained anything from this suit that they could not have obtained without litigation." Id. at 31a. In other words, despite the fact that defendants had not appealed, the Fifth Circuit reversed the trial court's finding that petitioners had prevailed within the meaning of the Fees Act,[2] and thereby held that the trial court had not erred in awarding only the $100 nominal fee. As the Fifth Circuit explained:

> "The district court could justifiably have denied the plaintiffs any attorney's fees at all. It follows a fortiori that it did not abuse its discretion,

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2. The Fifth Circuit held that this finding was "a matter of so-called ultimate fact," and that it thereby was not bound by the clearly erroneous standard of review. Appendix G at 32a n.2.

> as far as plaintiffs are concerned, in granting only a nominal sum. The defendants have not appealed from the grant of one hundred dollars, so we decline to disturb it." Id. at 32a-33a.

Thereafter, on April 7, 1981, the Fifth Circuit denied our petition for rehearing and for rehearing en banc. Appendix H at 34a-36a.

Petitioners here request this Court to issue a writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit and to summarily reverse the Fifth Circuit's decision below.

REASONS FOR GRANTING THE WRIT

Once plaintiffs have been deemed to be the prevailing parties under the Fees Act, they cannot be given a nominal fee but instead must be awarded "a reasonable attorney's fee." 42 U.S.C. §1988. See, e.g., Neely v. Grenada, 624 F.2d 547 (5th Cir. 1980); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980).

Aware of this requirement, the Fifth Circuit here affirmed a nominal $100 fee not by holding the fee reasonable but by holding that petitioners actually had never prevailed within the meaning of the Fees Act. By reaching this result -- where petitioners had twice been denied their rights before filing this lawsuit, and where petitioners ultimately vindicated their rights and obtained their objective after filing this lawsuit -- the Fifth Circuit rendered a decision which directly conflicts with the legislative intent of the Fees Act and with the decisions of every other court of appeals.

I. THE FIFTH CIRCUIT'S DECISION -- HOLDING THAT PLAINTIFFS WHO VINDICATED THEIR RIGHTS WERE NOT PREVAILING PARTIES -- IS IN DIRECT CONFLICT WITH THE LEGISLATIVE INTENT OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, AND IS IN DIRECT CONFLICT WITH THE DECISIONS OF EVERY OTHER COURT OF APPEALS

A. THE FEES ACT UNEQUIVOCALLY AUTHORIZES FEES FOR PLAINTIFFS WHO VINDICATE THEIR RIGHTS WITHOUT FORMALLY OBTAINING RELIEF

When Congress enacted the Fees Act, it explained that plaintiffs who vindicate their rights without winning a formal judgment nonetheless are to be deemed prevailing parties. As this Court recognized in Maher v. Gagne, 448 U.S. 122, 129 (1980), the Senate Report accompanying the Fees Act expressly states:

> "Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. Kopet v. Esquire Realty Co., 523 F.2d 1005 (2d Cir. 1975), and cases cited therein; Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969); Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970); Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975)." S.Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976).

The House Report makes the same point, and emphasizes that plaintiffs are to be deemed the prevailing parties where defendants voluntarily cease the challenged practice or otherwise do not need formal relief:

> "Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed. E.g., Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert denied, 409 U.S. 982 (1972); see also Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971)." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976).

As unequivocal as this language is, the illustrative cases relied on by Congress only underscore Congress' intent. Both the House Report and the Senate Report, for example, rely on Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970), a case in which

the sole Title VII plaintiff lost his individual claim and was entitled to no class relief in view of the defendant's post-lawsuit progress in achieving equal employment opportunity, but nonetheless was held to be the prevailing party because his "lawsuit acted as a catalyst which prompted [the defendant] to take action implementing its own fair employment policies." 433 F.2d at 429-430.

Of similar import are the two other cases cited with approval in the House Report. In Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972), the plaintiff failed to prove his individual claim and won no class relief but was held to have prevailed because he did prove part of the class claim. And in Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971), plaintiffs were found to have prevailed although they had won no relief.

Even more compelling are the cases relied on in the Senate Report. Particularly illustrative of Congress' intent in this context are Kopet v. Esquire Realty Co., 523 F.2d 1005 (2d Cir. 1975), and Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970), cert. denied, 401 U.S. 911 (1971). In Kopet, the plaintiff never won anything formally but was deemed to have prevailed by virtue of his having exposed embarrassing information through discovery.[3] In Thomas, plaintiffs-intervenors who ultimately lacked standing to sue were held to have prevailed and to be entitled to fees because of their successful efforts in causing the plaintiffs to sue. See also ASPIRA of New York, Inc.

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3. As set forth at 13, supra, the Senate Report relied on Kopet and on cases cited therein. Kopet cites two cases with approval, Blau v. Rayette-Faberge, Inc., 389 F.2d 469 (2d Cir. 1968), and Gilson v. Chock Full O'Nuts Corp., 331 F.2d 107 (2d Cir. 1964). In both cases attorney's fees were awarded for services performed by attorneys for stockholders who never filed suit at all.

v. Board of Education of the City of New York, 65 F.R.D. 541, 543 (S.D.N.Y. 1975), where plaintiffs were held to have prevailed because they had won some of their objectives through a consent decree which was obtained from defendants after "a change in the law . . . seemed to generate changes of heart."; and Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D.Ore. 1969), where a plaintiff who obtained no formal relief whatsoever nonetheless was held to be the prevailing party entitled to an award of fees.

In view of the language used by Congress and of the illustrative cases relied on, there can be little doubt that Congress intended plaintiffs such as petitioners here to be deemed prevailing parties. Petitioners, after all, were denied their rights twice before filing suit. After filing suit, they won their objective and vindicated their rights without the need for formal relief. To deny these petitioners prevailing party status -- as the

Fifth Circuit did below -- is to thwart the will of Congress.

B. CONSISTENT WITH THE INTENT OF THE FEES ACT, EVERY OTHER COURT OF APPEALS HAS HELD PLAINTIFFS TO BE PREVAILING PARTIES WHEN THEY VINDICATE THEIR RIGHTS THROUGH DEFENDANTS' "VOLUNTARY" ACTIONS

Based primarily on the legislative history of the Fees Act, and often upon the legislative history's "catalyst" case, Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970), the courts of appeals have been nearly unanimous in holding plaintiffs to be the prevailing parties when they obtain the objectives of their suits through defendants' "voluntary" actions. See, e.g., Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980); Williams v. Miller, 620 F.2d 199 (8th Cir. 1980); Oldham v. Ehrlich, 617 F.2d 163 (8th Cir. 1980); Northcross v. Board of Education of Memphis, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); Dawson v. Pastrick, 600 F.2d 70 (7th

Cir. 1979); Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978); International Society for Krishna Consciousness, Inc. v. Andersen, 569 F.2d 1027 (8th Cir. 1977); Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C.Cir. 1977); see also, Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188 (6th Cir. 1974), cert. denied, 422 U.S. 1048 (1975).

In fact, this catalyst approach -- under which plaintiffs are to be deemed prevailing parties entitled to a full award of fees when defendants provide the relief sought without the need for a court order -- is so well established that the Fifth Circuit expressly applied it on three occasions prior to its decision here. Robinson v. Kimbrough, 620 F.2d 468 (5th Cir. 1980); Dayan v. Board of Regents of University of Georgia, 620 F.2d 107 (5th Cir. 1980); Criterion Club of Albany v. Board of Commissioners, 594 F.2d 118 (5th Cir. 1979). The only apparent difference between these cases

and the Fifth Circuit's decision in the instant case is that the successful plaintiffs in none of the foregoing cases were officers and members of the Knights of the Ku Klux Klan.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE LEGISLATIVE INTENT OF THE FEES ACT BY PENALIZING PLAINTIFFS WHO OBTAIN AN OUT-OF-COURT RESOLUTION OF A CASE, AND ALSO BY DISCOURAGING COUNSEL FROM REPRESENTING INDIVIDUALS WHOSE RIGHTS HAVE BEEN VIOLATED

The legislative history, as set forth at 13-14, supra, establishes that plaintiffs are to be deemed prevailing plaintiffs when they win the objective of their lawsuit without formally obtaining judicial relief. The legislative history also cautions against penalizing plaintiffs who favorably resolve their grievances out of court: "A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." H.R.Rep. No. 94-1558, 94th Cong. 2d Sess., 7 (1976).

Here, the penalized petitioners could have litigated their First and Fourteenth Amendment claims through trial to final judgment. Instead, they responded to the in-court suggestion made by the trial judge, applied yet a third time to be able to hold their rally on public property as others had always been allowed to do, and obtained an out-of-court resolution which vindicated their rights and won the objective of their lawsuit. See Appendix E at 17a-20a. Although petitioners thus won their rights in a manner which lessened docket congestion, the Fifth Circuit below nonetheless impermissibly penalized them in violation of the Fees Act by holding that petitioners somehow had not been the prevailing parties.

The Fifth Circuit also violated the basic purpose of the Fees Act, which is to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." H.R.Rep. No. 94-1558,

94th Cong., 2d Sess., 9 (1976). Stated otherwise, since the "vast majority of the victims of civil rights violations cannot afford legal counsel," the Fees Act was "designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." Id. at 1.

The Senate Report is equally emphatic. Since our "civil rights laws depend heavily upon private enforcement," it is "essential" to award fees "if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S.Rep. No. 94-1011, 94th Cong., 2d Sess., 2 (1976). In sum, "[i]f private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights." Id.

A denial of prevailing party status to petitioners here has the undeniable effect of discouraging counsel from representing plaintiffs in controversial civil rights cases. This is particularly devasting since all citizens have an interest in the protection of freedom of expression and assembly for those with whom they disagree as well as for those with whom they agree. Accordingly, the Fifth Circuit's decision must be reversed in order to advance the interest of the public in preserving the freedoms guaranteed by the First and Fourteenth Amendments, and particularly to bring the Fifth Circuit in line with the legislative intent and purpose of the Fees Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the decision of the Fifth Circuit should be summarily reversed. Alternatively, the

petition should be granted, and the case set for plenary review.

Dated: New York, N.Y.
August 6, 1981

Respectfully submitted,

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APPENDICES

APPENDIX A

FILED
October 23, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. S78-0254(C)

DOUGLAS C. COEN, ET AL — PLAINTIFFS

V.

HARRISON COUNTY BOARD OF SUPERVISORS, ET AL — DEFENDANTS

The plaintiffs in this case are and represent the White Knights of the Ku Klux Klan. The plaintiffs in this case applied to the defendants for the right to use their athletic field while not in use by the school during recess, and particularly on Saturday. The school at Saucier, Mississippi had permitted the Republican Congressman in this district to hold a

night time political rally in that area without charge.

The plaintiffs contend as good American citizens that they were entitled to the same kind of recognition and treatment accorded the Congressman. The plaintiffs have a ritual and theme plan at these meetings to which these defendants objected and their request was orally denied.

At the hearing the Court suggested the tone, character and content of the plan to be submitted to the defendants in furtherance of their request. The Court further suggested that the plaintiffs post a $500 cash bond with the defendants conditioned to defray all costs and damages occasioned the premises by the rally or convocation of the plaintiffs. The news media advises the Court that on September 16, 1978, the plaintiffs held their rally at this site pursuant to

the request indicated.

The plaintiffs, through their counsel, have presented to the Court a motion for an attorney's fee in the amount of $7427.36. The defendants have objected to the motion and both sides have filed excellent briefs on the question. The general rule on this problem is stated by the Supreme Court of the United States in Alyeska Pipeline Service Co. Wilderness Society et al, 421 U.S. 240, 95 S.Ct. 1612, 1616.[1]

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[1] In Alyeska, supra, the Supreme Court held: "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. We are asked to fashion a far-reaching exception to this 'American Rule'; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals."

Significantly, since the Amendment of October 19, 1976, Title 42, United States Code Annotated, § 1988 in material part provides: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Court is of the opinion and so holds that the motion of the plaintiffs for a reasonable attorney's fee as a part of the cost in this case is without merit and will be denied.

A judgment accordingly may be presented to the Court for entry within five days under the rules of this Court.

October 19, 1978

/s/ Harold Cox

UNITED STATES DISTRICT JUDGE

APPENDIX B

FILED
November 20, 1978

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

DOUGLAS C. COEN and ROBERT PAGE, Individually and as Officers of the Invisible Empire, Knights of Ku Klux Klan, MISSISSIPPI GULF COAST CHAPTER; and the INVISIBLE EMPIRE, KNIGHTS OF THE KU KLUX KLAN, MISSISSIPPI GULF COAST CHAPTER PLAINTIFFS

VERSUS CIVIL ACTION NO. S78-0254(C)

HARRISON COUNTY BOARD OF SUPERVISORS: ERNEST C. MELVIN, LEROY URIE, WILLIAM J. McDONALD, HUE B. SNOWDEN, and ARLAN ROBINSON, Individually and as Members of the Harrison County Board of Supervisors; THE HARRISON COUNTY SCHOOL BOARD: and CHESTER COLLINS, BOBBY ELEUTERIUS, OREN MILLER, CHARLES LIZANA, and GERALD LOTT, Individually and as President and Members Respectively of the Harrison County School Board DEFENDANTS

JUDGMENT

This matter having come on the Plaintiffs' Motion for Attorneys' Fees, and the

Court having considered the Briefs submitted by counsel for the Plaintiffs and counsel for the Defendants, it is the judgment of the court that the Motion for Attorneys' Fees is not well taken and should be denied.

IT IS THEREFORE, ORDERED AND ADJUDGED that the Plaintiffs' Motion for Attorneys' Fees in this cause is denied.

IT IS FURTHER ORDERED AND ADJUDGED that the opinion of the Court as heretofore rendered on this question is incorporated in this Judgment as if fully and completely copied herein.

SO ORDERED AND ADJUDGED this the 16th day of November, 1978.

/s/ Harold Cox

UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
February 7, 1979

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

DOUGLAS C. COEN and ROBERT PAGE, Individually and as Officers of the Invisible Empire, Knights of Ku Klux Klan, MISSISSIPPI GULF COAST CHAPTER; and the INVISIBLE EMPIRE, KNIGHTS OF THE KU KLUX KLAN, MISSISSIPPI GULF COAST CHAPTER PLAINTIFFS

VERSUS CIVIL ACTION NO. S78-0254(C)

HARRISON COUNTY BOARD OF SUPERVISORS: ERNEST C. MELVIN, LEROY URIE, WILLIAM J. McDONALD, HUE B. SNOWDEN, and ARLAN ROBINSON, Individually and as Members of the Harrison County Board of Supervisors; THE HARRISON COUNTY SCHOOL BOARD; and CHESTER COLLINS, BOBBY ELEUTERIUS, OREN MILLER, CHARLES LIZANA and GERLAD LOTT, Individually and as President and Members Respectively of the Harrison County School Board DEFENDANTS

JUDGMENT OF DISMISSAL WITHOUT PREJUDICE

Having come on the agreed motion of the Plaintiffs and the Defendant Harrison

County School Board, et al, for a judgment of dismissal without prejudice, and the Court having determined the matters as set forth in the Complaint are now moot and the parties have agreed to dismiss this case without prejudice, the Court is of the opinion that this motion is well taken and should be sustained. It is therefore

ORDERED AND ADJUDGED that the above styled and numbered cause is dismissed without prejudice.

SO ORDERED AND ADJUDGED this the 6th day of February, 1979.

/s/ Harold Cox
UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM:

/s/
LAUGHLIN McDONALD
ATTORNEY FOR THE PLAINTIFFS

/s/
BEN F. GALLOWAY
ATTORNEY FOR THE DEFENDANTS

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1182
Summary Calendar*

DOUGLAS C. COEN, ET AL.,

Plaintiffs-Appellants,

versus

HARRISON COUNTY BOARD OF SUPERVISORS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

(SEPTEMBER 17, 1979)

Before COLEMAN, FAY and RUBIN, Circuit Judges.

PER CURIAM:

From a judgment denying plaintiffs' motion for attorneys' fees, plaintiffs appeal. We vacate and remand.

The facts of this case are not in dispute. Appellants, officers and members of the Mississippi Gulf Coast Chapter of the Ku Klux Klan, sought permission to use the local public school's athletic field for an "Americanism" rally during non-school hours. Although the facilities had previously been used for non-school functions such as political rallies and youth organization meetings, the Harrison County School Board denied petitioners request.

Plaintiffs filed suit in the United States District Court for the Southern

District of Mississippi, against the Harrison County School Board and the Harrison County Board of Supervisors for declaratory and injunctive relief, alleging deprivation of rights secured by the First and Fourteenth Amendments to the Constitution.

The District Court held a hearing and although no declaratory or injunctive relief was granted, the Court suggested that appellants reapply for use of the facility with the promise to avoid the display of weapons, the lighting of crosses, and the wearing of masked hoods. In addition, the judge suggested that appellants post a $500 cash bond with appellees in order to defray all costs and damages occasioned by appellants' assembly. Appellants complied with the judge's suggestions and agreed to post bond. Appellees granted appellants renewed request. It appears from the briefs on this appeal that the assembly was held

without incidence of violence or disturbance.

The Ku Klux Klan moved for attorney's fees.[1] The district court, citing Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), denied appellants motion for attorney's fees and issued an order to that effect. As previously noted, there is no order or judgment granting or denying injunctive or declaratory relief; nor is there a dismissal of the Harrison County School Board and its members.[2]

1/ Thereafter, the Harrison County Board of Supervisors and its members were dismissed as defendants upon the granting of their unopposed motion.

2/ Nonetheless, the award of attorneys fees is a "collateral order" and is appealable before terminating the main cause under 28 U.S.C. §1291 (1976). Trustees v. Greenough, 105 U.S. (15 Otto) 527, 531 (1881) (order fixing counsel fees, though incidental and collateral to the main cause, is so far independent of it and so (footnote continued on following page)

The district court's reliance on Alyeska Pipeline is misplaced. That case reaffirmed the "American Rule" that attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization. 421 U.S. at 269. However, in this case we are dealing with a motion for attorney's fees made pursuant to a specific statutory provision, i.e., the Civil Rights Attorneys Fees Award Act of 1976, Pub. L. No. 94-599, 90 Stat. 2641, 42 U.S.C. § 1988 (1976)

Although the Civil Rights Attorneys

(footnote continued from preceding page) finally dispositive of a particular matter as to make the decision as to counsel fees substantially a final decree for the purposes of an appeal). See also Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-46 (1949); Swanson v. American Consumer Industries, Inc., 517 F.2d 555, 559-60 (7th Cir. 1975); Angoff v. Goldfine, 270 F.2d 185, 186 (1st Cir. 1959).

Fees Awards Act provides that the award of fees lies within the discretion of the district court, this Court has held that a "prevailing party" should ordinarily recover attorneys fees unless special circumstances would render such an award unjust. Criterian [sic] Club of Albany v. Board of Commissioners of Dougherty County, 594 F.2d 118 (5th Cir. 1979). Naturally, the first step which a court must take prior to assessing attorneys fees in a civil rights case is to determine whether a party is a prevailing party within the meaning of the Act. Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979).

While we in no way intend to indicate our final opinion concerning the merits of this action, it appears that counsel for petitioner obtained authorization for the "Americanism rally," thereby accomplishing that which they sought to

accomplish. However, absent from the district court order are any findings to this effect. Accordingly, we vacate the order and remand this cause to the district court for specific findings as to which party was the prevailing party and a determination of what plaintiffs accomplished by bringing suit in the district court.

The order denying appellants' motion for attorneys' fees is vacated, and this cause is remanded for findings consistent with this opinion.

VACATED AND REMANDED.

APPENDIX E

FILED
October 16, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. S78-0254(C)

DOUGLAS C. COEN, ET AL PLAINTIFFS

V.

HARRISON COUNTY BOARD OF SUPERVISORS, ET AL DEFENDANTS

This case was remanded to this Court by the Fifth Circuit on September 17, 1979 on vacation of this opinion of October 19, 1978 and consequent order. This Court inquired of the plaintiffs specifically as to the nature and character of use they desired and intended to make of these school grounds. Thereupon, the Court suggested that the plaintiffs re-apply to the defendants for the right to use the school

grounds and suggested that they assure the defendants as a condition of the application that they would not burn crosses, would not ride horses on the grounds, would not bear arms, and would post a $500.00 bond to assure the fact that the grounds would be left as they were found.

Nothing further was heard of the case until the motion for attorney's fees was filed by the plaintiffs. No testimony was taken as to a reasonable attorney's fee. The Congress has made several recent changes in the rule for awarding attorney's fees. It must be understood that these plaintiffs never got permission to use these school grounds on any terms or conditions of their own making. But under the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C.A. § 1988) a party plaintiff may be considered the prevailing party even though the judgment was by

consent and without formally obtaining relief. That is, indeed, strange law. Some law is found on independent research to that effect.[1]

---

[1] Edward Brown et al v. Robert E. L. Culpepper, Jr. et al, (5CA) 559 F.2d 274, 277.

This Court, therefore, holds that the plaintiffs in this case under these circumstances were the prevailing party and consequently they are entitled to a reasonable attorney's fee, plus court costs in the trial court. The parties are directed by the Court either to agree on a reasonable attorney's fee and advise the Court thereof, or to furnish this Court with sworn statements of fact disclosing the actual amount of attorney's fee for one attorney.

In the event the parties cannot agree on a reasonable attorney's fee, the plaintiffs are directed to furnish such verified information to the Court within five days. The defendants shall file their answer thereto within five days after receipt of plaintiffs' statement. This Court will render its decision thereon promptly after receiving defendants' reply.

October 15, 1979 /s/ Harold Cox
UNITED STATES DISTRICT JUDGE

APPENDIX F

FILED
November 23, 1979

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

CIVIL ACTION NO. S78-0254(C)

DOUGLAS C. COEN, ET AL. PLAINTIFFS

VS.

HARRISON COUNTY SCHOOL DISTRICT, ET AL. DEFENDANTS

JUDGMENT

This cause came on for hearing on motion of the Plaintiffs for attorneys' fees as the prevailing party in the original action filed by the Plaintiffs as against the Defendants concerning the use of the ballpark facility at Saucier Elementary School for a meeting of the Ku Klux Klan and its Mississippi Gulf Coast Chapter.

And the Court having previously considered this matter has found that under the existing law the Plaintiffs were technically a prevailing party, although no injunctive relief was granted by this Court, and the use of the school ground premises was actually obtained by the Plaintiffs and granted by the Defendants on a proper application therefor which assured protection of the school ground properties and a minimum interference with the educational process being conducted in said facilities.

The Court, having fully considered the matter, finds that under the Civil Rights Attorneys Fee Award Act of 1976, Pub. L. No. 94-599, 90 Stat. 2641, 42 U.S.C. § 1988 (1976), the Court may consider whether or not special circumstances would render an award of attorneys' fees unjust, and the Court finds that any

award of attorneys' fees in this cause in excess of $100.00 under the special circumstances and the facts adduced before the Court would be unjust to the Defendants whose resistance to the use of the school grounds for the Ku Klux Klan rally was based on sound and just objections to the presence of firearms, horses, and burning crosses on the school ground itself, and not on a denial of the property as a public forum, and the Court specifically finds that the sum of $100.00 as attorneys' fees should be awarded to the Plaintiffs by the Defendants, and that said sum is a reasonable sum for a reasonable attorneys' fee under the special circumstnaces existing in this cause.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Plaintiffs' attorney be awarded the sum of $100.00 as attorneys'

fees for services in this cause.

SO ORDERED AND ADJUDGED, this the 21st day of November, 1979.

/s/ Harold Cox

UNITED STATES DISTRICT JUDGE

APPENDIX G

United States Court of Appeals,

Fifth Circuit.

Unit A

DOUGLAS C. COEN and ROBERT PAGE, individually and as officers of the Invisible Empire, Knights of the Ku Klux Klan, Mississippi Gulf Coast Chapter; and the Invisible Empire, Knights of the Ku Klux Klan, Mississippi Gulf Coast Chapter,

Plaintiffs-Appellants,

v.

THE HARRISON COUNTY SCHOOL BOARD et al.,

Defendants-Appellees.

No. 79-3970.

Appeal from the United States District Court for the Southern District of Mississippi.

February 23, 1981

Before WISDOM, POLITZ and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

The plaintiffs in this civil rights case appeal from a grant of one hundred dollars in attorney's fees, contending that the amount is too low. We affirm.

The plaintiffs are a unit of the Ku Klux Klan and two of its officers. In 1977 and 1978 they requested permission from the School Board of Harrison County, Mississippi, to hold an "Americanism Rally" at the ballpark facilities of Saucier Elementary School in Saucier, Mississippi. The School Board denied their requests.

The plaintiffs filed this suit under 42 U.S.C. § 1983 (1976), alleging deprivations of their first and fourteenth amendment rights and demanding declaratory and injunctive relief. After trial but before judgment, the trial judge suggested that the plaintiffs should make a new ap-

plication including assurances that they would post a bond for costs and property damage and would not burn crosses, carry firearms, or wear hooded robes. The plaintiffs did so, and the School Board granted permission for the rally. The rally was held on September 16, 1978 without violence or disturbance. Accordingly, the district court never issued a judgment on the merits.

The plaintiffs moved for allowance of attorney's fees of $8,192,36 under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976). Under that statute, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. E.g., Iranian Students Ass'n v. Edwards, 5 Cir. 1979, 604 F.2d 352; Criterion Club v. Board of Commissioners, 5 Cir. 1979,

594 F.2d 118 (per curiam); Morrow v. Dillard, 5 Cir. 1978, 580 F.2d 1284; Brown v. Culpepper, 5 Cir. 1977, 559 F.2d 274. The district court found that the plaintiffs were "technically" prevailing parties, but it nevertheless granted only a nominal fee. The court noted that it had issued no order granting relief to the plaintiffs. Further, the Board had objected to the rally on precisely those points on which the plaintiffs gave adequate assurances before they were permitted to hold the rally: firearms, hoods, burning crosses, and security for damage. This, the court reasoned, amounted to "special circumstances" warranting denial of any higher amount.

[1-3] It is undisputed that a plaintiff need not obtain formal relief in adversary proceedings to be a prevailing party for purposes of § 1988; it is enough

that his suit has served to vindicate his rights, whether by court decision, consent judgment, or voluntary compliance by the defendant after the filing of the suit. The proper focus is on whether the plaintiff has succeeded on the central issue, as exhibited by the fact that he has obtained the primary relief sought. Iranian Students Ass'n, 604 F.2d at 353; Criterion Club, 594 F.2d at 120; Brown, 559 F.2d at 277; Hanrahan v. Hampton, 198[illegible] 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670, 674; Robinson v. Kimbrough, 5 Cir. 1980, 620 F.2d 468, 475-76; S.Rep. No.1011, 94th Cong., 2d Sess. 5, reprinted in [1976] U.S. Code Cong. & Ad.News 5908, 5912. To recover an attorney's fee, however, it is not sufficient the plaintiff has obtained what he asked for; it is also necessary that his suit be, if not the sole reason for his success, at least a

major factor in bringing it about. A civil rights plaintiff may not collect attorney's fees for demanding that a state officer do what he would have done in any case. See also Criterion Club, 594 F.2d at 120; Ward v. Deerman, 5 Cir. 1980, 626 F.2d 489, 492 (per curiam).

[4-6] In this light, it appears that the district court erred, if at all, only in its terminology. The court found that the School Board rejected the plaintiffs' initial requests because of its concern that Klan members would carry guns, wear hoods, and burn crosses at the planned rally (as they had done at previous rallies). This finding is not clearly erroneous, and we accept it. When the Klan assured the Board that there would be no guns, hoods, or crosses, the Board gave permission for the rally. Thus, although the district court stated in its judgment

that the plaintiffs had "technically" prevailed, it ultimately rested its decision on the "special circumstance" that it was the plaintiffs, not the defendants, who acceded to the other parties' terms. "The use of the school ground premises was actually obtained . . . on a proper application which assured protection of the school ground properties and a minimum interference with the educational processes being conducted in said facilities." In the context of § 1988 there is no such thing as a "technically prevailing plaintiff"; the issue of who has prevailed is a realistic judgment, not a technical one. As a realistic matter, the plaintiffs have not gained anything from this suit that they could not have obtained without litigation.[1/] Therefore, they did not prevail

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1/ This is a statement about the actual result of the dispute, not about the rele-
(footnote continued on following page)

within the meaning of § 1988.[2/]

The district court could justifiably have denied the plaintiffs any attorney's fees at all. It follows a fortiori that it did not abuse its discretion, as far as the plaintiffs are concerned, in granting only a nominal sum. The defendants have not appealed from the grant of one

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(footnote continued from preceding page) vant law. We express no opinion as to whether the plaintiffs would have been entitled to hold their rally without giving assurances, nor as to whether the Board could rightfully have withheld permission even after receiving assurances.

2/ Whether the plaintiffs have prevailed is a matter of so-called ultimate fact -- "simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts" or the subsidiary facts as found by the district court. Hence, we are not bound by the "clearly erroneous" standard of review on that point. E.g., Galena Oaks Corp. v. Scofield, 5 Cir. 1954, 218 F.2d 217, 219; Skou v. United States, 5 Cir. 1976, 526 F.2d 293, 295; Borg-Warner Acceptance Corp. v. Fedders Financial Corp. (In re Hammons), 5 Cir. 1980, 614 F.2d 399, 403.

hundred dollars, so we decline to disturb it.

AFFIRMED.

APPENDIX H

FILED
April 7, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

No. 79-3970

DOUGLAS C. COEN and ROBERT PAGE, individually and as officers of the Invisible Empire, Knights of the Ku Klux Klan, Mississippi Gulf Coast Chapter; and the INVISIBLE EMPIRE, KNIGHTS OF THE KU KLUX KLAN, MISSISSIPPI GULF COAST CHAPTER,

Plaintiffs-Appellants,

versus

THE HARRISON COUNTY SCHOOL BOARD, ET AL,

Defendants-Appellees.

- - - - - - -

Appeal from the United States District Court for the Southern District of Mississippi

- - - - - - -

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion February 23, 1981, 5 Cir., 198_, _____F.2d_____).

(April 7, 1981)

Before WISDOM, POLITZ and SAM D. JOHNSON, Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not hav-

ing voted in favor of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
UNITED STATES CIRCUIT JUDGE

Opposition

Office - Supreme Court, U.S.
FILED
NOV 14 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-286

In the Supreme Court of the United States

OCTOBER TERM, 1981

DOUGLAS C. COEN and ROBERT PAGE, individually and as officers of the Invisible Empire, Knights of the Ku Klux Klan, Mississippi Gulf Coast Chapter; and the INVISIBLE EMPIRE, KNIGHTS OF THE KU KLUX KLAN, MISSISSIPPI GULF COAST CHAPTER — Petitioners

VERSUS

THE HARRISON COUNTY SCHOOL BOARD; and CHESTER COLLINS, BOBBY ELEUTERIUS, OREN MILLER, CHARLES LIZANA and GERALD LOTT, individually and as President and members respectively of the Harrison County School Board, — Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

BOYCE HOLLEMAN
HOLLEMAN AND KROGSTAD
A PROFESSIONAL ASSOCIATION
POST OFFICE DRAWER 1030
GULFPORT, MISSISSIPPI 39501
601/863-3142

Counsel for Respondents

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Whether the Plaintiffs, who after filing suit acceded to the terms of the Defendants at the suggestion of the trial court, can be considered the "prevailing party", within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended, entitled to attorney's fees.

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A. THE FEE ACT AUTHORIZES ATTORNEY FEES ONLY FOR PARTIES WHOSE LAWSUITS ARE THE CATALYST OR RESULT IN COMPLIANCE BY THE OTHER PARTY WITH THE APPLICABLE LAW 5

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Parham v. Southwestern Bell Telephone Co.,
433 F.2d 421 (8th Cir. 1970) *5*

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42 U.S.C., 1988, as amended 5

STATEMENT OF THE CASE

On August 3, 1978, Petitioners filed a Complaint in the United States District Court for the Southern District of Mississippi, Southern Division, for injunctive and declaratory relief. The original dispute involved an allegation by the Petitioners, Plaintiffs-Appellants below, that they had been denied their rights under the First and Fourteenth Amendments to the United States Constitution to assemble and to hold an "Americanism Rally" on the public school grounds of Saucier Elementary School located in Harrison County, Mississippi. During the course of the proceedings on the Petitioners' Complaint for Declaratory and Injunctive Relief, it became apparent to the trial court that it was the Petitioner's "ritual and theme plan" to which the Respondents, Defendants-Appellees below, objected. The trial court thereupon suggested that the Petitioners re-apply for permission to hold their rally under the conditions that the Petitioners, and its members, would refrain from carrying firearms, burning crosses, wearing hooded robes, and post a five hundred dollar ($500.00) property damage bond. Appendix "A" at 2A. The Petitioners submitted a new application and the Respondents granted the use of the school grounds after receiving the assurances of the Petitioners that there would be no firearms, crosses burned, hooded

robes, and the posting of a $500.00 property damage bond, as the trial court had instructed the Petitioners. The Petitioners' rally was held on those conditions on September 16, 1978, without incident. Appendix "A" at 2A.

Counsel for the Petitioners then filed a Motion for Attorney's Fees which was denied by the trial court and appeal was taken to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit vacated the Judgment of the trial court denying attorney's fees in an opinion issued September 17, 1979, and remanded it to the trial court for "specific findings as to which party was the prevailing party and a determination of what Plaintiffs accomplished . . . ".

On remand, the trial court held that the Petitioners were, under the circumstances, the "prevailing party" despite the fact the "Plaintiffs never got permission to use these school grounds on any terms or conditions of their own making." Appendix "B" at 7A. After consideration by the trial court, a Judgment was entered on November 21, 1979, which appears herein as Appendix "C", in which the trial court found that the Petitioners were "technically prevailing parties" despite the fact that use of the school grounds was obtained on a "proper application

therefor" and a finding that the denial by the Respondents was "based on sound and just objections . . . and not on a denial of the property as a public forum". Appendix "C" at 12A. The trial court there upon awarded the Petitioners "the sum of $100.00 as attorney's fees" finding that "said sum is a reasonable sum for a reasonable attorney's fee *under the special circumstances existing in this cause,* (Emphasis ours)". Appendix "C" at 12A.

Petitioners, for the second time, appealed to the Fifth Circuit. The Fifth Circuit affirmed, holding that the trial court " . . . erred, if at all, only in its terminology." in finding that the Petitioners 'had "technically" prevailed,' and that the Petitioners "did not prevail" within the meaning of the Fees Act. Appendix "D" at 20A. The Fifth Circuit declined to disturb the award of "$100.00 under the special circumstances" granted by the trial court due to the fact that the Respondents did not appeal from that award. Petitioners were, thereafter, denied a rehearing and rehearing en banc by the Fifth Circuit. From that affirmation the Petitioners request this court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and to summarily reverse the Fifth Circuit's decision below.

SUMMARY OF ARGUMENT

Plaintiffs were not prevailing parties within the meaning of the Fees Act in that the Plaintiffs obtained no affirmative relief from the trial court and the Defendants committed no act either voluntary or otherwise by the filing of the Plaintiffs' suit for declaratory prompted and injunctive relief. *Ward v. Dearman*, 626 F. 2d 489 (5th Cir. 1980); *Williams v. Miller*, 620 F. 2d 199 (8th Cir. 1980). The Fifth Circuit considered logical inferences of the undisputed facts that the Plaintiffs acceded to the terms of the Defendants in holding that there was so such thing as a "technically prevailing party" and that the Plaintiffs were not ultimately the "prevailing parties" within the meaning of the Fees Act. *Causey v. Ford Motor Company*, 516 F. 2d 416, 420-421 (5th Cir. 1975). The decision of the Fifth Circuit is clearly within the legislative intent of the Fees Act and decisions of the various courts of appeals that only parties whose lawsuits are the catalyst for obtaining the relief sought are entiled to attorney's fees as prevailing parties. The Plaintiffs did not achieve any objective of their lawsuit through a judgment, consent decree, settlement or any other voluntary action on part of the Defendant and in fact achieved their objectives only by their own voluntary act of submitting a proper application with certain voluntary restrictions on the

Plaintiffs, at the suggestion of the trial court.

I. THE FIFTH CIRCUIT'S DECISION HOLDING THAT THE PLAINTIFFS —— WHO ACCEDED TO THE OTHER PARTIES TERMS AND GAINED NOTHING FROM THE FILING OF THEIR SUIT THAT COULD NOT HAVE BEEN OBTAINED WITHOUT LITIGATION, WERE NOT PREVAILING PARTIES —— IS IN DIRECT LINE WITH LEGISLATIVE INTENT OF THE FEES ACT AND DECISIONS OF THE VARIOUS COURTS OF APPEAL.

A. THE FEE ACT AUTHORIZES ATTORNEY FEES ONY FOR PARTIES WHOSE LAWSUITS ARE THE CATALYST OR RESULT IN COMPLAINCE BY THE OTHER PARTY WITH THE APPLICABLE LAW.

Under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, as amended, a party is entitled to attorney's fees if under the facts its' lawsuit acted as a "catalyst" or prompted the other party to comply with the law, either by judgment, consent decree or voluntary action of the other party, so as to make it the prevailing party. *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); see also *N.A.A.C.P. v. Bell*, 448 F. Supp. 1164 (DCDC

1978). The initial focus in determining whether a party is a prevailing party within the meaning of the Fees Act is establishing the issue or condition which the party sought to change to his benefit and then to whether as a practical matter the outcome (e.g. judgment, consent decree or voluntary action by other party) was the result of the party seeking the fee. *Bonnes v. Long*, 599 F. 2d 1316, 1319 (4th Cir. 1979); see also, *Iranian Students Assoc. v. Edwards*, 604 F.2d 352 (5th Cir. 1979).

Succinctly stated, to qualify as a prevailing party the Petitioner, Plaintiff-Appellant below, must have secured the relief sought as a "catalyst" of his lawsuit. Petitioners filed suit declaratory and injunctive relief alleging that the Respondents, Defendant-Appellees below, "twice" denied them their rights under the first and Fourteenth Amendments to assemble. It was apparent to the trial court, and the Fifth Circuit in reviewing the ultimate facts, that the Respondent objected not to the Petitioners' right to a public forum, but to the Petitioners' previous practices of carrying guns, burning crosses, wearing hoods and damaging property. See Appendix "C" at 12 A; Appendix "D" at 19A. The trial court in reviewing the facts stated in its judgment that the Respondents' objections were based on "sound and just objections . . ., and not on a denial of the property as a public

forum," which was the central issue of the Petitioners' lawsuit. See Appendix "C" at 12 A. The Petitioners acceded to the terms of the Respondents in giving its' assurances, at the suggestion of the trial court, that there would be no firearms, crosses burned, hooded robes and a $500.00 property damage bond and it was this voluntary act of the Petitioners that resolved the alleged dispute and not any act of the Respondents. As the trial court stated in its' judgment entered on November 21, 1979:

> And the court having previously considered this matter has found that under the existing law the Plaintiffs were *technically* a prevailing party, although no injunctive relief was granted by this court, and the use of the school ground premises was *actually obtained by the Plaintiffs* and granted by the Defendants *on a proper application therefor* which assured protection of the school ground properties and a minimum interference with the educational process being conducted in said facilities (emphasis ours.) Appendix "C" at 11A.

In *Ward v. Dearman*, supra, the Plaintiffs, who received no affirmative relief from the trial court, sought to recover attorney's fees under the Fees Act asserting they achieved their goal by voluntary compliance rather than court action. The Fifth Circuit held that the Plaintiffs were not prevailing parties within the meaning of the Fees Act in that the only voluntary compliance present in the case was that of

the Plaintiffs and there must be voluntary compliance from Defendants. *Id.* at 492; citing *Brown v. Culpepper,* 559 F. 2d 274 (5th Cir. 1977).

The Petitioners, herein, secured no relief whatsoever either by judgment, consent decree or voluntary act of the Respondents. Petitioners did not prevail at any point in this litigation. On the contrary, Petitioners by their own voluntary act made a proper application for the use of the school facilities under the terms suggested to the Petitioners by the trial court. The Petitioners filed suit, then by their own voluntary act acceded to those certain conditions that had prompted the Respondents to previously reject the Petitioners' application for use of the school grounds. Given the spirit and purpose of the Fee Act, the legislative intent can surely not be interpreted to include an award of attorney's fees in such an instance as this.

This is not a case in which the Plaintiffs have shown a class wide discrimination but failed to establish that they suffered injury individually. See *Bolton v. Murray Envelope Corp.,* 553 F. 2d 881 (5th Cir. 1977). Nor is this a case in which "Plaintiff was successful on his individual claim but did not prevail on his class wide allegations." *Taylor v. Safeway Stores, Inc.,* 524 F. 2d 263 (10th Cir. 1975). And final-

ly this is not a case in which the Plaintiff's suit was the "catalyst" for a voluntary compliance by the Defendants. *Ward v. Dearman*, supra; see also *Brown v. Culpepper*, supra.

The Petitioner met none of the requirements of a prevailing party entitled to attorney's fees based on the findings of the trial court and the ultimate facts in the present case. The Fifth Circuit considered the logical inferences of the undisputed facts that there was no order granting relief, Petitioners, not the Respondents, acceded to the demands of the other party, and that the Petitioners had gained nothing from their suit that could not have been obtained without litigation. Appendix "D" at The Fifth Circuit decision, that the Petitioners did not prevail within the meaning of the Fees Act, was one of "ultimate fact", therefore they were not limited to the "clearly erroneous" standard of review. Appendix "D" at 19A; *Causey v. Ford Motor Company*, 516 F. 2d 416, 420-421 (5th Cir. 1975). It would not be consistent with the intent of the Fees Act to allow a Plaintiff to recover attorney's fees where the resolution of the dispute resulted from the concessions of the Plaintiff on those very points to which the Defendant objected prior to the filing of suit.

B. IT WOULD NOT BE CONSISTENT WITH THE INTENT OF THE FEES ACT TO AWARD ATTORNEY'S FEES TO PLAINTIFFS, WHO, AFTER FILING SUIT, RESOLVED THE DISPUTE BY ITS' OWN VOLUNTARY CONCESSION TO DEFENDANTS' TERMS.

It is undisputed that parties to civil rights litigation can be considered the "prevailing parties" within the meaning of the Fees Act when they obtain the objectives of their suit through voluntary compliance by the Defendant. *Brown v. Culpepper,* supra. Numerous authorities, including three from the Fifth Circuit, are cited by the Petitioners in support of the proposition that where after filing suit a dispute is resolved through the Defendants' "voluntary" actions, the Plaintiffs are the prevailing parties entitled to attorney's fees within the meaning of the Fees Act. Each of these authorities is distinguishable from the present case, not because the various Plaintiffs therein were not members of the Ku Klux Klan, but in each the Defendants voluntarily complied with the objectives of the Plaintiffs' suits, either to the direct benefit of the Plaintiffs or in furtherance of the public interests. In the present case the issues presented by the Petitioners, that it was "twice" denied its rights, were resolved by the voluntary concessions of the Petitioners, therefore its suit was not the "catalyst"

for the results obtained. See Appendix "C" at 12 A; Appendix "D" at 16A. It would not be consistent with the intent of the Fees Act to award attorney's fees where the party seeking the fee, not the Defendants, acceded to the other parties' terms, resolving the dispute. Accordingly, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

CONCLUSION

The Petitioners herein meet none of the requirements of a "prevailing party" within the mean ing of the Fees Act in that their suit did not result in any judgment, consent decree or voluntary compliance by the Respondents. The Respondents, prior to this litigation, were justifiably concerned with the carrying of firearms, burning of crosses, wearing of hooded robes and possible destruction of school property, especially keeping in mind the recent displays in the area by the Petitioners and possible resulting violence. Once in the stage of litigation, however, the Petitioners, at the suggestion of the trial court, voluntarily complied with those terms and submitted a proper application which assured the protection of public property and minimal violence. The trial court did little more than order the Petitioners to take protective steps in its use of the public property. Never was there any attempt to deny use of the grounds under those

conditions which would reasonably protect public property, of which the Respondents were custodians, or to deny the Petitioners its right to assemble as is evidenced by their subsequent use under those conditions suggested by the trial court. The Petitioners' suit did not serve to vindicate their rights nor did it advance the public interest in civil rights as they gained nothing from their suit that they could not have obtained without litigation by making a proper application for the use of school property with those voluntary assurances given by them, resolving the dispute. Accordingly, the Fifth Circuit's decision should be affirmed and Petitioner's Writ of Certiorari denied, as this is not the type of civil rights litigation envisioned when Congress amended its laws to include attorney's fees. The spirit and philosophy behind such awards were clearly to aid those persons who acted as private attorney generals to enforce their civil liberties, and not such a case as this where the parties' suit neither advanced civil rights nor aided Petitioners.

Respectfully submitted,

BOYCE HOLLEMAN
HOLLEMAN AND KROGSTAD
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39501
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Attorney for the Respondents

CERTIFICATE

I, the undersigned counsel, do hereby certify that I have this day forwarded via United States Mail, postage prepaid, true and correct copies of the foregoing Brief of Respondents to:

Robert J. LaBine, Esquire
20 Indiana Avenue
Long Beach, New York 11561

E. Richard Larson, Esquire
Bruce J. Ennis, Esquire
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036

This the 13th day of November, 1981.

BOYCE HOLLEMAN

Appendix A

Filed October 2, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. S78-0254(C)

DOUGLAS C. COEN, ET AL PLAINTIFFS

V.

HARRISON COUNTY BOARD OF
SUPERVISORS, ET AL DEFENDANTS

The plaintiffs in this case are and represent the White Knights of the Ku Klux Klan. The plaintiffs in this case applied to the defendants for the right to use their athletic field while not in use by the school during recess, and particularly on Saturday. The school at Saucier, Mississippi had permitted the Republican Congressman in this district to hold a night time political rally in that area without charge.

The plaintiffs contend as good American citizens that they were entitled to the same kind of

recognition and treatment accorded the Congressman. The plaintiffs have a ritual and theme plan at these meetings to which these defendants objected and their request was orally denied.

At the hearing the Court suggested the tone, character and content of the plan to be submitted to the defendants in furtherance of their request. The Court further suggested that the plaintiffs post a $500 cash bond with the defendants conditioned to defray all costs and damages occasioned the premises by the rally or convocation of the plaintiffs. The news media advises the Court that on September 16, 1978, the plaintiffs held their rally at this site pursuant to the request indicated.

The plaintiffs, through their counsel, have presented to the Court a motion for an attorney's fee in the amount of $7,427.36. The defendants have objected to the motion and both sides have filed excellent briefs on the question. The general rule on this problem is stated by the Supreme Court of the United States in *Alyeska Pipeline Service Co. Wilderness Society* et al, 421 U.S. 240, 95 S.Ct. 1612, 1616.[1]

[1]. In *Alyeska*, supra, the Supreme Court held: "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorenys' fee from the loser. We are asked to fashion a far-reaching exception to this 'American Rule'; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals."

Significantly, since the Amendment of October 19, 1976, Title 42, United States Code Annotated, § 1988 in material part provides: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Court is of the opinion and so holds that the motion of the plaintiffs for a reasonable attorney's fee as a part for the cost in this case is without merit and will be denied.

A judgment accordingly may be presented to the Court for entry within five days under the rules of this Court.

October 19, 1978

/s/ Harold Cox

UNITED STATES DISTRICT JUDGE

Appendix B

Filed October 16, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. S78-0254(C)

DOUGLAS C. COEN, ET AL PLAINTIFFS

V.

HARRISON COUNTY BOARD OF
SUPERVISORS, ET AL DEFENDANTS

This case was remanded to this Court by the Fifth Circuit on September 17, 1979 on vacation of this opinion of October 19, 1978 and consequent order. This Court inquired of the plaintiffs specifically as to the nature and character of use they desired and intended to make of these school grounds. Thereupon, the Court suggested that the plaintiffs re-apply to the defendants for the right to use the school grounds and suggested that they assure the defendants as a condition of the application that they would not burn

crosses, would not ride horses on the grounds, would not bear arms, and would post a $500.00 bond to assure the fact that the grounds would be left as they were found.

Nothing further was heard of the case until the motion for attorney's fees was filed by the plaintiffs. No testimony was taken as to a reasonable attorney's fee. The Congress has made several recent changes in the rule for awarding attorney's fees. It must be understood that these plaintiffs never got permission to use these school grounds on any terms or conditions of their own making. But under the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C.A. § 1988) a party plaintiff may be considered the prevailing party even though the judgment was made by consent without formally obtaining relief. That is, indeed, strange law. Some law is found on independent research to that effect.[1]

This Court, therefore, holds that the plaintiffs in this case under these circumstances were the prevailing party and consequently they are entitled to a reasonable attorney's fee, plus court costs in the trial court. The parties are directed by the Court either to agree on a reasonable attorney's fee and ad-

1. *Edward Brown et al v. Robert E. L. Culpepper, Jr. et al*, (5CA) 559 F. 2d 274, 277.

vise the Court thereof, or to furnish this Court with sworn statements of fact disclosing the actual amount of attorney's fee for one attorney.

In the event the parties cannot agree on a reasonable attorney's fee, the plaintiffs are directed to furnish such verified information to the Court within five days. The defendants shall file their answer thereto within five days after receipt of plaintiffs' statement. This Court will render its decision theron promptly after receiving defendants' reply.

October 15, 1979

/s/ Harold Cox
UNITED STATES DISTRICT JUDGE

Appendix C

Filed November 23, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. S78-0254(C)

DOUGLAS C. COEN, ET AL. PLAINTIFFS

VS.

HARRISON COUNTY SCHOOL
DISTRICT, ET AL. DEFENDANTS

JUDGMENT

This cause came on for hearing on motion of the Plaintiffs for attorneys' fees as the prevailing party in the original action filed by the Plaintiffs as against the Defendants concerning the use of the ballpark facility at Saucier Elementary School for a meeting of the Ku Klux Klan and its Mississippi Gulf Coast Chapter.

And the Court having previously considered this matter has found that under the existing law the Plaintiffs were technically a prevailing party, although no injunctive relief was granted by this Court, and the use of the school ground premises was actually obtained by the Plaintiffs and granted by the Defendants on a proper application therefor which assured protection of the school ground properties and a minimum interference with the educational process being conducted in said facilities.

The Court, having fully considered the matter, finds that under the Civil Rights Attorneys Fee Award Act of 1976, Pub. L. No. 94-599, 90 Stat. 2641, 42 U.S.C. §1988 (1976), the Court may consider whether or not special circumstances would render an award of attorneys' fees unjust, and the Court finds that any award of attorneys' fees in this cause in excess of $100.00 under the special circumstances and the facts adduced before the Court would be unjust to the Defendants whose resistance to the use of the school grounds for the Ku Klux Klan rally was based on sound and just objections to the presence of firearms, horses, and burning crosses on the school ground itself, and not on a denial of the property as a public forum, and the Court specifically finds that the sum of $100.00 as attorneys' fees should be awarded to the Plaintiffs by the Defendants, and that said sum

is a reasonable sum for a reasonable attorneys' fee under the special circumstances existing in this cause.

IT IS THEREFORE, ORDERED AND ADJUDGED that the Plaintiffs' attorney be awarded the sum of $100.00 as attorneys' fees for services in this cause.

SO ORDERED AND ADJUDGED, this the 21st day of November, 1979.

/s/ Harold Cox
UNITED STATES DISTRICT JUDGE

Appendix D

United States Court of Appeals,
Fifth Circuit.

Unit A.

DOUGLAS C. COEN AND ROBERT PAGE, individually and as officers of the Invisible Empire, Knights of the Ku Klux Klan, Mississippi Gulf Coast Chapter; and the Invisible Empire, Knights of the Ku Klux Klan, Mississippi Gulf Coast Chapter,

Plaintiffs-Appellants,

v.

THE HARRISON COUNTY
SCHOOL BOARD et al.,
Defendants-Appellees.

No. 79-3970.

Appeal from the United States District Court for the Southern District of Mississippi.

February 23, 1981

Before WISDOM, POLITZ AND SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

The plaintiffs in this civil rights case appeal from a grant of one hundred dollars in attorney's fees, contending that the amount is too low. We affirm.

The plaintiffs are a unit of the Ku Klux Klan and two of its officers. In 1977 and 1978 they requested permission from the School Board of Harrison County, Mississippi, to hold an "Americanism Rally" at the ballpark facilities of Saucier Elementary School in Saucier, Mississippi. The School Board denied their requests.

The plaintiffs filed this suit under 42 U.S.C. § 1983 (1976), alleging deprivations of their first and fourteenth amendment rights and demanding declaratory and injunctive relief. After trial but before judgment, the trial judge suggested that the plaintiffs should make a new application including assurances that they would post a bond for costs and property damage and would not burn crosses, carry firearms, or wear hooded robes. The plaintiffs did so, and the School Board granted permission for the rally. The rally was held on September 16, 1978 without

violence or disturbance. Accordingly, the district court never issued a judgment on the merits.

The plaintiffs moved for allowance of attorney's fees of $8,192.36 under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976). Under that statute, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. *E.g., Iranian Students Ass'n v. Edwards*, 5 Cir. 1979, 604 F. 2d 352; *Criterion Club v. Board of Commissioners*, 5 Cir. 1979, 594 F. 2d 118 (per curiam); *Morrow v. Dillard*, 5 Cir. 1978, 580 F. 2d 1284; *Brown v. Culpepper*, 5 Cir. 1977, 559 F. 2d 274. The district court found that the plaintiffs were "technically" prevailing parties, but it nevertheless granted only a nominal fee. The court noted that it had issued no order granting relief to the plaintiffs. Further, the Board had objected to the rally on precisely those points on which the plaintiffs gave adequate assurances before they were permitted to hold the rally: firearms, hoods, burning crosses, and security for damage. This, the court reasoned, amounted to "special circumstances" warranting denial of any higher amount.

[1-3] It is undisputed that a plaintiff need not obtain formal relief in adversary proceedings to be a prevailing party for purposes of § 1988; it is enough

that his suit has served to vindicate his rights, whether by court decision, consent judgment, or voluntary compliance by the defendant after the filing of the suit. The proper focus is on whether the plaintiff has succeeded on the central issue, as exhibited by the fact that he has obtained the primary relief sought. *Iranian Students Ass'n*, 604 F.2d at 353; *Criterion Club*, 594 F. 2d at 120; *Brown*, 559 F.2d at 277; *Hanrahan v. Hampton*, 1980, 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670, 674; *Robinson v. Kimbrough*, 5 Cir. 1980, 620 F.2d 468, 475-76; S. Rep. No.1011, 94th Cong. 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5912. To recover an attorney's fee, however, it is not sufficient the plaintiff has obtained what he asked for; it is also necessary that his suit be, if not the sole reason for his success, at least a major factor in bringing it about. A civil rights plaintiff may not collect attorney's fees for demanding that a state officer do what he would have done in any case. *See also Criterion Club*, 594 F.2d at 120; *Ward v. Deerman*, 5 Cir. 1980, 626 F. 2d 489, 492 (per curiam).

[4-6] In this light, it appears that the district court erred, if at all, only in its terminology. The court found that the School Board rejected the plaintiffs' initial requests because of its concern that Klan members would carry guns, wear hoods, and burn

crosses at the planned rally (as they had done at previous rallies). This finding is not clearly erroneous, and we accept it. When the Klan assured the Board that there would be no guns, hoods, or crosses, the Board gave permission for the rally. Thus, although the district court stated in its judgement that the plaintiffs had "technically" prevailed, it ultimately rested its decision on the "special circumstance" that it was the plaintiffs, not the defendants, who acceded to the other parties' terms. "The use of the school ground premises was actually obtained . . . on a proper application which assured protection of the school ground properties and a minimum interference with the educational processes being conducted in said facilities." In the context of § 1988 there is no such thing as a "technically prevailing plaintiff"; the issue of who has prevailed is a realistic judgment, not a technical one. As a realistic matter, the plaintiffs have not gained anything from this suit that they could not have obtained without litigation.[1]

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1. This is a statement about the actual result of the dispute, not about the relevant law. We express no opinion as to whether the plaintiffs would have been entitled to hold their rally without giving assurances, nor as to whether the Board could rightfully have withheld permission even after receiving assurances.

Therefore, they did not prevail within the meaning of § 1988.[2]

The district court could justifiably have denied the plaintiffs any attorney's fees at all. It follows a fortiori that it did not abuse its discretion, as far as the plaintiffs are concerned, in granting only a nominal sum. The defendants have not appealed from the grant of one hundred dollars, so we decline to disturb it.

AFFIRMED.

2. Whether the plaintiffs have prevailed is a matter of so-called ultimate fact —— "simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts" or the subsidiary facts as found by the district court. Hence, we are not bound by the "clearly erroneous" standard of review on that point. *E.g., Galena Oaks Corp. v. Scofield, 5th Cir. 1954, 218 F.2d 217, 219; Shou v. United States,* 5 Cir. 1976, 526 F. 2d 293, 295; *Borg-Warner Acceptance Corp. v. Fedders Financial Corp. (In re Hammons),* 5 Cir. 1980, 614 F.2d 399, 403.